IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3235 of 2006

with

CIVIL application No.2677 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VALIBEN JETHABHAI BHANJI - Petitioner(s)
Versus
PATAN MUNICIPALITY - Respondent(s)

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Appearance :
MS SHRUSHTI THULA FOR MR BP GUPTA for Petitioner
MR NV ANJARIA for Respondent

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 14/07/2006

ORAL JUDGMENT

1. In the present petition, the petitioner, an

employee of respondent Patan Municipality has challenged the notice/order dated 28.11.2005 by which the petitioner is ordered to be prematurely retired with effect from 28.2.2006.

2. On 28th February,2006 when this petition came up for preliminary hearing, this Court passed the following order:

> "1. Draft amendment allowed.
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> 2. In the present petition, the petitioner has challenged an order/notice dated 28-11-2005 by which it is conveyed to the petitioner by the employer that her service will stand terminated on 28-02-2006 after office hours. This order has been passed by which the petitioner is compulsorily retired upon reaching the age of 55 years.
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> 3.The petitioner has challenged the validity of rule permitting the employer to resorting to compulsory retirement. Prima facie, I find that there is no substance to the said challenge. Similar rules contained in various services including one governing the employees of the central Government contained in Fundamental rule 56-J have been upheld by the Hon'ble Supreme Court way back in the year 1954 and this view has been reiterated many times thereafter.
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> 4. The petitioner has however, through the draft amendment stated before this Court that

since her engagement as Sweeper on 01-09-1974, she has been working honestly and sincerely and that no adverse remarks have been communicated to her at any point of time nor has she received any show cause notice nor any departmental inquiry initiated against her. It is thus the case of the petitioner that she has an unblemished service record. In view of the averments made in the draft amendment, issue notice returnable on 14th March, 2006.

5. So far as interim relief is concerned, it may be noted that the impugned order is passed on 28-11-2005. The present petition is filed on 24-02-2006 and moved for the first time on 27-02-2006. This leaves virtually no time for the Court to issue notice to the other side and grant them hearing why the interim relief should not be granted. The learned advocate is unable to explain why the petition was not filed and moved earlier. I carry an impression that it is not the fault of the petitioner but a clear error on the part of the petitioner's advocate in not moving the petition earlier. Despite the creation of the unfortunate situation by the advocate of the petitioner, I cannot deny the relief to the petitioner which would ultimately hurt the petitioner and not her advocate.

6.On the basis of averments made in the draft amendment reproduced here-in-above, considering the fact that the petitioner is engaged as Safai Kamdar, I find that the impugned notice/order of her termination is required to be stayed at-least till the next date of hearing. Therefore, by way of ad interim

relief, it is directed that impugned order dated 28-11-2005 shall stand stayed till 14-03-2006.

Direct service is permitted today."

The above interim order continued from time to time and the petitioner was protected from termination of service.

3. At the request and with the consent of the learned advocates appearing for the parties, the petition has been taken up for final disposal at the admission stage.

4. Before adverting to the legal controversies arising, short facts need to be noted.

5. The petitioner was appointed as Sweeper by the respondent Municipality on 1.9.74. Since then she has been discharging her duties on regular establishment. The case of the petitioner is that her service is satisfactory and that there has been no complaint about her performance of duties. Despite this, respondent has issued the impugned notice dated 28.11.2005 requiring the petitioner to retire from service with effect from 28.2.2006. The notice itself records that the petitioner having completed the age of 55

years on 15.12.2005, the said notice is issued against her terminating her service from 28.2.2006 upon completion of the period of three months of notice.

5.1It is the case of the petitioner that the action of the respondent is illegal and unlawful. Primarily, it is contended that rule 5 of the Patan Municipality Compulsory Retirement of the Employees and the Reemployment of Retired Persons Rules 1963 (hereinafter to be referred to as “the said Rules”) is unconstitutional and invalid. It is contended that the normal age of retirement being 58 years, the petitioner cannot be retired before the said age. It is also contended that in any case, the service of the petitioner has been most satisfactory. There have been no complaints, adverse remarks or inquiries against the petitioner in her 31 years of satisfactory service and therefore, the petitioner cannot be terminated unceremoniously without assigning any reason.

5.2 On the other hand, the case of the respondent is that as per rule 5 of the said Rules, the

respondent Municipality enjoys a wide discretion to retire an employee once he or she crossed the age of 55 years. This can be done by giving notice of three months without assigning any reasons. It is in exercise of these powers, the respondent Municipality has sought to terminate the services of the petitioner. It is contended that the Municipality is facing severe financial crisis. A resolution, therefore, came to be passed by by the Municipality on 30th October 2005. In the said resolution, it was decided that in order to reduce the staff, such powers should be exercised in cases of those employees who crossed the age of 55 years. It is, therefore, the contention of the respondent that the powers are exercised by the respondent Municipality in public interest and this Court, therefore, should not interfere with the exercise of such powers. It is also contended that unless the order is shown to be arbitrary, malafide or based on no material at all, this Court in exercise of writ jurisdiction would not interfere with the exercise of powers by the employer.

5.3 A detailed affidavit has been filed by the respondent Municipality containing the above mentioned aspects of defence of the Municipality. Additionally, it is also stated that for better administration, it is open for the respondent to chop off the dead wood. With respect to the validity of rule 5 of the said Rules, it is denied that the same gives unbridled or unfettered powers. In short, it is contended that it is always open for the respondents to exercise such powers in public interest.

6. On the basis of the above material on record, learned advocates appearing for the parties have made submissions before this Court.

7. Learned advocate Ms.Shrusti Thula for the petitioner submitted that the impugned notice/order is wholly illegal and unlawful. She contended that rule 5 of the said Rules is invalid and should be declared inoperative. She submitted that the said rule gives uncontrolled and unguided powers to the respondent Municipality to require any employee to

prematurely retire after 55 years of age by issuance of notice for a period of three months without assigning any reasons. She contended that such powers are always open to misuse. In support of her contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of N.C.Dalwadi v. State of Gujarat, (1987) 3 SCC 611 wherein the Hon'ble Supreme Court observed that even if the order of compulsory retirement is made under such a rule, the Government must show that the order was necessary in public interest, otherwise the order would be bad.

7.1 Reliance was also placed on a decision of the learned single Judge of this Court in the case of J.K.Rasania v. Gujarat Housing Board, 2003 (1) GLR 466 wherein under similar situation, learned Judge had made similar observations.

7.2 It was further contended that the age of retirement has been fixed under the said Rules. Through executive instructions, the respondent cannot vary or modify the age of retirement and require the employee to retire earlier than the

normal age of superannuation. It was also contended that in the present case, the respondent has failed to demonstrate any public interest in requiring the petitioner to retire early. To suggest that the respondent Municipality decided to reduce the staff and that, therefore, the order of premature retirement was resorted to cannot be the basis to contend that the same was in public interest. In support of her contention, reliance was placed in the case of Rajat Baran Roy v. State of W.B., (1999) 4 SCC 235 wherein the Hon'ble Supreme Court finding that the order was not passed in public interest was pleased to quash the same.

7.3 Reliance was also placed on the decision of this Court in the case of Doshi Fatechan Morarji reported in 2002 (1) GLH 50 wherein the learned Judge observed that normal age of superannuation cannot be left to the sweet will or caprice of the authority.

8. On the other hand, learned advocate Shri N.V.Anjaria appearing for the respondent Municipality sought to support the impugned

order. He submitted that for economic reasons, the Municipality decided to reduce the staff which was necessary since the financial burden on the Municipality was difficult to bear. The governing body of the Municipality, therefore, passed a resolution deciding to require all employees who crossed the age of 55 years to retire in exercise of powers under rule 5 of the of the said Rules. He submitted that the action is, therefore, based on public interest. He submitted that the employer has wide discretion to require an employee to retire from service in terms of service rules. Under rule 5 of the said Rules, the only requirement is of giving three months notice and that such an action should be based on public interest.

8.1 He further submitted that unless and until the powers exercised by the employer in this regard are found to be wholly arbitrary, malafide or based on no material, this Court would not interfere in exercise of powers of writ jurisdiction. Reliance was placed on a decision of the Hon'ble Supreme Court in the case of

Baikuntha Nath Das v. Chief Dist. Medical Officer, (1992) 2 SCC 299 wherein while discussing the concept of retirement, the Hon'ble Supreme Court observed that the order of compulsory retirement does not amount to punishment and the principles of natural justice are not required to be observed. Learned counsel particularly relied on the observations made by the Hon'ble Supreme Court wherein it was stated that judicial review in such cases is open only on grounds of malafides, arbitrariness and perversity. He submitted that the ratio laid down in the said decision of Baikunth Nath Das (supra) has been followed by the Hon'ble Supreme Court in number of decisions subsequently and reference to the subsequent decisions is, therefore, not necessary.

8.2 With respect to the validity of rule 5, he submitted that the requirement that the action of the respondent should be in public interest is inbuilt in the rules and especially when the respondent is in a position to demonstrate that in the present case such powers have been exercised in fact in public interest, the rule cannot be

declared invalid or ultra vires the Constitution. Learned advocate Shri Anjaria further submitted that the provisions of rule 5 of the said Rules can be read down as to include the concept of such powers being exercised only in public interest and the rule thus need not be declared unconstitutional. Reliance this regard was placed on a decision of the Hon'ble Supreme Court in the case of Jagdish Pandey v. Chancellor, Bihar University, AIR 1968 SC 353.

9. Before going into the question of justness of the impugned order, the challenge of the petitioner to rule 5 of the said Rules can be considered.

9.1 Rule 3 (e) of the said Rules provides that the age of compulsory retirement shall mean the age of 58 years. Rule 5 of the said Rules provides, inter alia, that every Municipal servant shall compulsorily retire from service of the Municipality on the date on which he attains the age of compulsory retirement. Proviso to rule 5 of the said Rules, however, provides that the Municipality may require a Municipal servant to

retire at any time on or after crossing the age of 55 years on giving three months notice without assigning reasons and that the Municipal servant may also retire after he attains the age of 55 years voluntarily on giving such notice to the Municipality.

9.2 Rule 6 of the said Rules, inter alia, provides that no Municipal servant who has reached the age of compulsory retirement shall be retained or re-employed in the Municipality except as otherwise provided in the said Rules. Rule 5 of the said Rules reads as follows:-

> "5. Every Municipal servant shall compulsorily retire from the service of the Municipality on the date on which he attains the age of compulsory retirement.
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> Provided that the Municipality may require a Municipal servant to retire at any time on or after he attains the age of 55 years on giving him three months notice without assigning reason and that a Municipal servant may also retire on or after he attains the age of 55 years voluntarily on giving such notice to the Municipality."

It can thus be seen that the normal age of superannuation for the employees of the respondent Municipality is 58 years. Upon crossing the said age, the Municipal servant has to per force retire from service. Proviso to rule 5, however, gives power to the Municipality to require a Municipal servant to retire at any time after attaining the age of 55 years by giving three months notice, however, without assigning any reasons. Correspondingly, the employee has a right to retire after he attains the age of 55 years by giving similar notice of three months.

10. Such right to retire an employee of Government or its Corporations after crossing certain age in public interest is well-recognized right in service jurisprudence. Rule 161 of the BCSR gives similar power to the State Government with respect to its employees while Fundamental Rule 56(j) gives similar power to the Central Government with respect to its employees. Validity of such rules has been tested before different courts in past.

11. Somewhat similar provisions of rule 161 of BCSR came up for consideration before this Court in the case of Ishwarlal v. State, 1963 GLR 945 and a Division Bench of this Court held that such termination is termination simpliciter flowing from a condition of service and is neither dismissal nor removal nor reduction in rank within the meaning of Article 311 of the Constitution. Rule 161(c)(ii)(2) of BCSR was therefore, declared valid and it was held that the same does not suffer from invalidity and the same is founded on a definite policy, a definite object or a criterion, namely, administrative efficiency and public interest.

11.1Provisions contained in Article 465-A of the Civil Service Regulations 1920 which gave similar powers to the Central Government came up for consideration before the Hon'ble Supreme Court in the case of Shyamlal l v. State of U.P., AIR 1954 SC 369. The relevant provisions stated that the Government retains an absolute right to retire any officer after he has completed twenty-five years' qualifying service without giving any

reasons. Validity of such rule was upheld by the Hon'ble Supreme Court in the said decision holding that the termination of an employee in exercise of such powers does not amount to removal or dismissal and the rule, therefore, would not violate the constitutional provisions contained in Article 311 of the Constitution. This view of the Hon'ble Supreme Court was subsequently followed in the case of Shivcharana v. State of Mysore, AIR 1965 SC 280. In the case of Union of India v. J.N.Sinha, AIR 1970 SC 40, referring to Fundamental Rule 56(j), the Hon'ble Supreme Court found that the powers contained therein can be exercised in public interest and the employee so made to retire retains his service rights and he does not lose any of the right acquired by him before retirement and the order of retirement therefore involves no civil consequences.

12. With this background in mind, if one reverts back to the present case, one finds that against the normal age of superannuation being 58 years, the rules permit the respondent Municipality to

require its employees to retire upon giving a notice of three months after attaining the age of 55 years. Though not specifically stated, the requirement of such exercise only in public interest can be read into the rules and the validity of the rule itself need not be questioned. It is undoubtedly true that each order that may be passed by the Municipality shall have to be judged on the basis whether the exercise of powers itself is in public interest or not. It is, however, not necessary to strike down the rule itself on this basis alone. Even in case of N.C.Dalwadi (supra), the Hon'ble Supreme Court and in the case of J.K.Rasania (supra), this Court adopted such a course. It was found that the order that the employer may pass in such a case has to be demonstrated to be in public interest. Challenge to the constitutional validity of rule 5 of the said Rules therefore is required to be turned down. In the case of Jagdish Pandey v. Chancellor, Bihar University (supra) also, the Hon'ble Supreme Court read down the provisions

so as to hold them constitutionally valid. The factual background and the rules in question in the said decision though were different from the present case, I do not see any reason why in the present case, such a course should not be adopted.

13. This brings me to the central controversy arising in this petition. As noted earlier, the case of the petitioner is that having put in 31 years of spotless service, it is not open for the respondent to retire her prematurely only on the ground that the Municipality wishes to reduce its staff. Whereas the case of the Municipality has been that to retire an employee prematurely is the power which the Municipality enjoys and if such power is exercised to reduce financial burden, the same must be construed as having been exercised in public interest. Before deciding the said issue, one may notice that in service jurisprudence, there are different kinds of retirement envisaged. In a recent decision rendered in Special Civil Application No.572 of 2005 on 7.7.2006, this

Court made the following observations:-

"10. With this background in mind, one may recall that in service jurisprudence, different kinds of retirements are envisaged.

(i)Superannuation retirement takes place when an employee crosses the maximum age prescribed under the service rules beyond which he cannot remain in active service.

(ii)Compulsory retirement is one of the penalties under different service regulations. It can be imposed on an employee upon a departmental inquiry on the basis of proved charges. For example, in Gujarat Civil Service (Discipline and Appeal) Rules, (rule 6(6)) compulsory retirement is provided as one of the major penalties.

(iii) Premature retirement is a concept where the employer in terms of service regulations has power to order retirement of an employee upon crossing certain age or completion of certain number of years of service in public interest. Rule 161 of the BCSR gives such powers to the State Government with respect to its employees. Fundamental Rule 56J gives similar

powers to the Central Government with respect to Central Government employees.

(iv)Voluntary retirement is a concept where an employee upon completion of certain number of years of qualifying service can with the permission of the employer proceed on voluntary retirement. If the employee has put in sufficient number of years of service and is permitted to retire on voluntary retirement basis, he retains all the benefits of the service already put in and would be entitled to all post retiral benefits on the basis of number of years of service put in by him.

(v)In certain service regulations, there is also a concept of retirement on medical grounds permitting the employee to seek pension called invalid pension even though the employee may not have put in sufficient number of qualifying years of service to seek pension under the normal rules. To this kind of retirement, we need not go into in the present petition."

It may be noted that the term compulsory retirement is often used for non-penal premature

retirement. One may, however, not lose sight of the fact that there is a distinct difference between these two kinds of retirements, namely, penal retirement upon departmental inquiry on the basis of proved misconduct which normally results into disentitling an employee from seeking any pensionary benefits and a non-penal retirement referred to as the premature or compulsory retirement upon completion of certain number of years of service in which case the employee retains all the benefits of the past service and is entitled to full post retiral benefits on that basis. One may also notice that in recent past, voluntary retirements pursuant to voluntary retirement schemes are getting currency. Employers often come up with voluntary retirement schemes to reduce the staff and the salary burden. Such schemes are construed as an invitation to offer as was held by the Hon'ble Supreme Court in the case of Bank of Inida v. O.P.Swarnakar, reported in (2003) 2 SCC 721.

14.In the present petition, this Court is concerned with a case of premature/compulsory retirement

of an employee who is required to be retired before the normal age of superannuation by the employer upon completion of 55 years of age. Short question is whether retiring such an employee on the ground that the employer requires to reduce the staff would be a valid exercise of the powers and whether such a purpose can be termed to be in public interest as is sought to be suggested.

15. The term "compulsory retirement" as a non-penal premature retirement has received a certain definite connotation through series of decisions of the Hon'ble Supreme Court. Through large number of decisions, it is by now well understood that such powers, be it under rule 161 of the BCSR in case of State Government or be it FR 56(j) in case of the Central Government or any other such service conditions are available to the employer for better efficiency of the administration and to chop off the dead wood. It is held time and again that an employee who has crossed certain age that may be specified in the service rules and whose service

is found to be not satisfactory may be required to be retired compulsorily before attaining the age of superannuation and such powers have been recognized and protected by the Courts in public interest.

16. As noted earlier, in the case of Union of India v. J.N.Sinha (supra), the Hon'ble Supreme Court in para 8 observed that the order of compulsory retirement does not involve civil consequence. It was further observed that the Government may feel that a particular post may be more usefully held in public interest by an officer more competent than the one who is holding. It was further observed that there is no denying the fact that in all organizations and more so in Government organizations, there is good deal of dead wood. It is in public interest to chop off the same. Fundamental Rule 56(j) holds the balance between the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the government servant, the Government is given power to energise its machinery and make

it more efficient by compulsorily retiring those who in its opinion should not be there in public interest.

16.1 This ratio laid down by the Hon'ble Supreme Court in the case of Union of India v. J.N.Singh (supra) and the observations noted hereinabove have been followed in number of subsequent decisions. In the case of Gian Singh v. P.& H. High Court, AIR 1980 SC 1894, it was observed that the expression “public interest” in the context of premature retirement has a well settled meaning. It refers to cases where the interests of public administration require the retirement of a Government servant who with the passage of years has prematurely ceased to possess the standard of efficiency, competence and utility called for by the Government service to which he belongs. In para 7 of the judgment, the Hon'ble Supreme Court made following observations:

> “7.It is next contended by the petitioner that the expression “public interest” in the Premature Retirement Rules is vague and the rule is for that reason ultra vires.

> In our opinion, the expression in the context of premature retirement has a well settled meaning. It refers to cases where the interests of public administration require the retirement of a government servant who with the passage of years has prematurely ceased to possess the standard of efficiency, competence and utility called for by the Government service to which he belongs. No stigma or implication of misbehaviour is intended, and punishment is not the objective. It appears to us to be beyond dispute that the decision of the High Court to recommend the premature retirement of the petitioner in the light of his record of service must be regarded as falling within the scope of expression ”public interest”.”

16.2 In the case of Union of India v. M.E.Reddy, AIR 1980 SC 563, the Hon'ble Supreme Court referring to the provisions contained in rule 16(3) of All India Service (Death-cum-retirement) Rules 1958 giving powers to the Government to compulsorily retire an employee observed in para 11 that the main object of the rule is to instill a spirit of dedication and dynamism in the working of the State Services so as to ensure

purity and cleanliness in the administration which is the paramount need of the hour. Any element of constituent of the service which is found to be lax or corrupt, inefficient or not upto the mark or has outlived his utility has to be weeded out. Rule 16(3) provides the methodology for achieving this object. It was further observed that before the Central Government invokes the power under Rule 16(3), it must take particular care that the rule is not used as a ruse for victimisation by getting rid of honest and unobliging officers in order to make way for incompetent fovourites of the Government which is bound to lead to serious demoralisation in the Services and defeat the laudable object which the rule seeks to subserve.

16.3 In the case of H.C.Gargi v. State of Haryana, AIR 1987 SC 65, considering the order of compulsory retirement passed by the Government under the provisions of the Punjab Civil Service Rules, it was observed that the power of compulsory retirement under Rule 3-25(d) of the Rules can be exercised subject to the conditions mentioned in the rule, one of which is that the

concerned authority must be of the opinion that it is in public interest to do so. The test in such cases is public interest as laid down by this Court in Union of India v. J.N.Sinha (AIR 1971 SC 40).

16.4 In the case of State of Gujarat v. S.C.Shah, 1999 (3) GLR 2060, the Hon'ble Supreme Court in para 11 of the decision observed that what is public interest was explained in the classic decision in the case of Union of India v. Col.J.N.Sinha, AIR 1970 SC 40. It was further observed that it was pointed out that the object of premature retirement of a Government servant was to weed out the inefficient, corrupt, dishonest employees from the Government service. The public interest in relation to public administration means that only honest and efficient persons are to be retained in service while the services of the dishonest or the corrupt or who are almost dead wood, are to be dispensed with. In para 18 of the decision, the Hon'ble Supreme Court noted the observations made in the case of K.Kandaswamy v. Union of India (AIR 1996

SC 277) wherein it has been observed that while exercising power under rule 56(j) of the Fundamental Rules, the appropriate authority has to weigh several circumstances in arriving at the conclusion that the employee requires to be compulsorily retired in public interest. The Government is given power to energise its machinery by weeding out dead wood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service. In para 23 and 24 of the said decision, it was further observed that in order to find out whether any Government servant has outlived his utility and is to be compulsorily retired in public interest for maintaining an efficient administration, an objective view of overall performance of that Government servant has to be taken before deciding either to retain him further in service or to dispense with his services in public interest. It was further observed that the performance of a Government servant is reflected in the annual character roll entries and, therefore, one of the methods of discerning the efficiency, honesty or

integrity of a Government servant is to look at his character roll entries for the whole tenure from the inception to the date on which decision for his compulsory retirement is taken. It is obvious that if the character roll is studded with adverse entries or the overall categorization of the employee is poor and there is material also to cast doubts upon his integrity, such a Government servant cannot be said to be efficient. Efficiency is a bundle of sticks of personal assets, thickest of which is the stick of “integrity”. If this is missing, the whole bundle would disperse.

16.5In the case of Baikuntha Nath Das (supra) also the Hon'ble Supreme Court recognized the power of the employer to retire an employee in public interest upon crossing certain age. It was observed in para 34 that the order of compulsory retirement is not a punishment and that the order has to be passed by the Government on forming the opinion that it is in the public interest to retire a government servant compulsorily. It was further observed that the Government or the

Review Committee shall have to consider the entire record of service before taking a decision in the matter and more importance should be attached to the later years in particular. In sub-para (iv) of para 34, the Hon'ble Supreme Court made the following observations :

> "(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entires in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority."

16.2In the case of State of UP v. Bihari Lal, AIR 1995 SC 1161, it was reiterated that the entire service record of the employee should be taken into account while taking a decision under Fundamental Rule 56(j) and upon overall assessment

of the record, the Government has to reach a decision to compulsorily retire an employee in public interest.

16.3 In the case of K.Kandaswamy v. Union of India, AIR 1996 SC 277, it was observed that while exercising powers under rule 56(j) of the Fundamental Rules, the appropriate authority has to weigh several circumstances in arriving at the conclusion that the employee requires to be compulsorily retired in public interest. The Government is given power to energise its machinery by weeding out dead wood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service. When the appropriate authority forms bona fide opinion that compulsory retirement of the Government employee is in the public interest, Court would not interfere with such an order. It was further observed that the appropriate Government, therefore, would need to consider the totality of the facts and circumstances appropriate in each case and would form an opinion whether compulsory retirement of a Government employee would be in

the public interest. The opinion must be based on the material on record, otherwise the same would amount to arbitrary or colourable exercise of power.

16.4 In the case of Union of Inida v. V.P.Seth, AIR 1994 SC 1261, it was observed that while taking such a decision, uncommunicated adverse remarks can be taken into consideration.

17. Upshot of the above judicial pronouncements would be that the concept of compulsory retirement as a non-penal termination of the employee upon crossing certain age but before crossing the age of superannuation in terms of the service rules has received definite connotation. Such powers are required to be exercised in public interest. The concept of “public interest” in this context is understood to be the requirement of administration to energize itself for better and more efficient administration and in this regard it is found that it is always open for the employer in exercise of such powers to weed out the dead wood, to remove inefficient and to augment the

efficiency and integrity in public service. It is found that the Government has power to weed out the dead wood, inefficient, corrupt and people of doubtful integrity by compulsorily retiring them from service. It can thus be seen that in the context of the powers of the employer to compulsorily retire an employee without holding an inquiry, the same must be based on public interest as is understood in the context of several decisions of the Hon'ble Supreme Court, reference to some of which have been made herein-above. The crux of the matter therefore would be that such powers can be exercised in public interest to improve the efficiency of the administration and in that sense such powers can be exercised either to weed out dead wood or to remove inefficient employees or to remove the persons of doubtful integrity. In my opinion, the term “public interest” in context of such powers cannot be given such a wide meaning as to include any and every question of public importance or interest as is sought to be done by the respondent in the

present case. In the ordinary sense of the term though to downsize the work force or to reduce the salary burden, may be considered as public interest, in my opinion, reference to such a purpose is not to be included for the purpose of exercising powers of compulsorily retiring an employee before he attains the age of superannuation. Nature of powers enjoyed by employer under such provisions have been discussed and outlined by various decisions cited herein-above. There is reasonable guarantee that an employee will be permitted to discharge his duties till he crosses the age of superannuation. As observed in the case of Doshi Fatechan Morarji (supra) normal age of superannuation cannot be left at the sweet will or caprice of the employer.

18. The question can be looked from a slightly different angle. As noticed above, rule 3(e) of the said Rules provides for the age of compulsory retirement or which is popularly referred to as the age of superannuation. That age is fixed as 58 years. Respondent herein

contends that it has taken a conscious decision to retire all employees upon crossing the age of 55 years in exercise of powers under rule 5 of the said Rules. By a resolution, the Municipality, therefore, seeks to re-write the age of retirement and amend the rule which guarantees a certain length of tenure to its employees. Surely, a statutory rule cannot be modified by executive instructions is too well laid down a proposition which needs no backing. However, in the case of Rajinder Singh v. State of Punjab, AIR 2001 SC 1769, the Hon'ble Supreme Court observed that no Government order, notification, or circular can be a substitute of the statutory rules framed with the authority of law. It otherwise tantamounts to amending the rules by a Government order and ignoring the mandate of Article 309 of the Constitution and also negates the accepted service jurisprudence. The said Rules are are formulated by the Municipality in exercise of powers under Section 271(1) of the Gujarat Municipalities Act and are sanctioned by the

State Government. The Rules therefore have statutory force.

19. The problem can be looked at from yet another angle. An employee of the Government or its agencies has certain degree of assurance of his lien in service. The concept of lien has been discussed by the Hon'ble Supreme Court on number of occasions. In the case of Jagdish Lal v. State of Haryana, (1997) 6 SCC 538, it was observed that under Fundamental Rule 14-A(a) a Government servant's lien on a post in no circumstances be terminated even with his consent if the result will be to leave him without a lien or a suspended lien upon a permanent post.

19.1 In the case of Triveni Shankar Saxena v. State of U.P., 1992 Supp (1) SCC 524, the Hon'ble Supreme Court observed that the word “lien” originally means “binding” from the Latin *ligamen.* Its lexical meaning is “right to retain”. The word “lien” is now variously described and used under different contexts such as 'contractual lien', 'equitable lien', 'specific

lien', 'general lien' etc. A person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier.

19.2 In the case of Delhi Transport Corporation v. D.T.C. Mazdoor Congress, 1991 Supp. (1) SCC 600, the Hon'ble Supreme Court observed that the employees of the public undertakings, statutory Corporations or instrumentalities of the State covered by Article 12 enjoy certain status. Employment in such undertakings being public employment, society has a stake and interest in it. It was observed that such employees must have service security. The Hon'ble Supreme Court thus recognized the concept of protection of lien of employees of the State and its instrumentalities. It was further observed that the rights of the Government Companies and Public Corporations which are State instrumentalities and their employees cannot be governed by the general principle of master and servant and the management cannot have unrestricted and unqualified power of terminating the services of the employees. In the interest of

service of efficiency of the public bodies, however, they should have the authority to terminate the employment of undesirable, inefficient, corrupt, indolent and disobedient employees, but it must be exercised fairly, objectively and independently and the occasion for the exercise must be delimited with precision and clarity. Further, there should be adequate reason for the use of such a power and a decision in this regard has to be taken in a manner which should show fairness, avoid arbitrariness and evoke credibility. It was observed that an element of uncertainty is likely to lead to grave and undesirable consequences. It was observed by Hon'ble Mr Justice P.B.Sawant that clause (b) of regulation 9 contains a much hated and abused rule of hire and fire reminiscent of the days of laissez faire and unrestrained freedom of contract. It was further observed that right to life includes right to livelihood and therefore right to livelihood cannot hang on to the fancies of individuals in authority. Hon'ble Mr.Justice K.Ramaswamy also in his concurring judgment

observed that the arbitrary, unbridled and naked power of wide discretion to dismiss an permanent employee without any guidelines or procedure would tend to defeat the constitutional purpose of equality and allied purposes. It can thus be seen that there is a reasonable degree of assurance of protection of lien in favour of the employees of the State and its instrumentalities who are holding permanent posts on permanent basis.

19.3 It can thus be seen that the lien of the employees of the respondent Municipality cannot be terminated without due process of law. Unless and until the lien is terminated, it would not be possible to terminate the services of the employee. Such lien cannot be curtailed before the person reaches the age of superannuation, unless of course, his service is terminated through exercise of valid powers and brought to an end legally. As long as the post which is sanctioned in the establishment is in existence, the person occupying the post on permanent basis must be permitted to discharge his or her duties

till crossing the age of superannuation unless, of course, the lien is terminated through valid process of law.

20. It is by now well settled that though initially the employer-employee relation is one of contractual relationship, in case of Government and its instrumentalities, such relationship thereafter is governed by statute. In the case of UPSC v. Girish Jayantilal Vaghela, (2006) 2 SCC 482, it was observed that a private employer in India enjoys almost complete freedom to select and appoint anyone he likes and there is no statutory provision mandating advertisement of the post or making of selection strictly on merit. However, in case of regular Government servant there is undoubtedly a relationship of master and servant but on account of constitutional provisions like Articles 16, 309 and 311, his position is quite different from a private employee. Thus, employment under the Government is a matter of status and not a contract even though the acquisition of such a status may be preceded by a contract, namely, an

offer of appointment which is accepted by the employee. The rights and obligations are not determined by the contract of the two parties but by statutory rules framed by the Government in exercise of power conferred by Article 309 of the Constitution and the service rules can be unilaterally altered by it. This dictum has been followed by the Hon'ble Supreme Court in large number of decisions, reference to all of them is not necessary.

21. It can thus be seen that the petitioner was engaged by the respondent Municipality with a reasonable degree of certainty of tenure. She was holding a permanent post and she was a regular permanent incumbent on the said post. Unless her services were terminated through valid process of law, she had the right to continue in service till crossing the age of superannuation. Such an employment could not have been brought to an end abruptly by seeking to exercise powers under rule 5 of the said Rules by giving notice of three months without assigning any reasons. Permitting the

respondent to resort to such powers in the background of the present case would amount to permitting the respondent to terminate the lien of an employee though the post is still in existence. As long as the post continues, the regular incumbent thereon could not have been terminated without any reason. Perhaps, it was open for the Municipality to abolish the post if so found necessary due to financial constraints, in which case, however, the rule of last-come-first-go would operate. Not only under section 25-G and H of the Industrial Disputes Act in case of a workman of an industry, such right flows also from the equality clause enshrined under Articles 14 and 16 of the Constitution of India and would be available to non-workmen also as long as they are employed by the State or its instrumentalities. Thus by resorting to retire an employee compulsorily upon crossing the age of 55 years, what is effectively done by the respondent Municipality is to curtail her lien without abolishing the post and also to resort to termination on the premise of

requirement of reduction in the staff without following the principle of last-come-first-go. Unless there are special reasons to retain the junior in preference to the senior, such an action cannot sustain the test of Articles 14 and 16 of the Constitution.

22. There is yet another reason why the action cannot be sustained. For downsizing the staff, it is open for the Municipality to provide for a voluntary retirement scheme. Such voluntary retirement, however, cannot be enforced in the guise of exercise of powers under rule 5 of the said Rules, which as noted earlier, is confined to certain contingencies. Otherwise, in place of voluntary retirement scheme, compulsory retirement scheme will become operative which is not envisaged under the service rules governing the petitioner.

23. In conclusion, I find that the action of the respondent was wholly impermissible and unsustainable. There is absolutely no dispute about the contention of the petitioner that her service has always been totally satisfactory.

There has been no complaint about her performance in service. To require a Class IV employee to retire before the normal age of superannuation only on the ground that though her services may be outstanding, her performance may be glorious, she must surrender three years of service since the Municipality has consciously decided to send her or those who have crossed the age of 55 years home would be wholly impermissible and unsustainable in the eye of law.

24. In fact, the respondent has somewhat dichotomically suggested in the reply that the petitioner who was working as Safai-kamdar had attained 55 years of age and was considered a dead-wood. It is further stated that Safai-Kamdar are required to perform the duties of cleaning the roads, gutters, to pick and collect garbage from the roads and streets in the town and with advancing age, the nature of work has harsher effect on such class of employees and in most of the cases like that of petitioner, it leads to decline in human efficiency and the

Municipality had to compel such employees to work under force. The stand of the Municipality is perplexing, to say the least. It has nowhere come on record that with advancing age, the performance or the efficiency of the petitioner had gone down. No material has been placed on record to substantiate this stand. The service record of the petitioner is not shown to be suffering from any deterioration. In fact, it is not even the case of the Municipality that a proper exercise of examining the service performance of the petitioner was undertaken which revealed that she had reached the stage of inefficiency. In case of the petitioner on what basis did the Municipality reach such a conclusion is also not stated. Without appraisal of the service record of the petitioner the Municipality has reached such a conclusion only on the basis of conjecture. Additionally, the underlying message of this contention would be that the respondent would hire a younger, fitter and fresher hand. This by itself would negate the professed purpose of reducing the staff

size. Thus, quite apart from completely lacking in material to support such a contention, I find that the stand of the Municipality runs counter to its main thrust of argument that regardless of the efficiency of the employee and regardless of his/or service record, the Municipality intends to terminate the services of one and all upon crossing the age of 55 years. The general statement made in this regard would convince me that the Municipality intends to reduce the age of retirement of such employees through an executive fiat without amending the Rules. Surely, this is wholly impermissible.

25. In the result, I find merit in the petition. The impugned notice of termination is therefore quashed. Rule is made absolute accordingly with no order as to costs.

26. In view of the order passed in the main matter, the Civil Application is rejected.

(Akil Kureshi, J.)

(vjn)